


**CITY OF HIALEAH  
CITY ATTORNEY'S OFFICE**

**MEMORANDUM**

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**TO:** Mayor Carlos Hernandez, and  
Members of the Hialeah City Council

**FROM:** William M. Grodnick, City Attorney 

**DATE:** June 6 2013

**RE:** Approval of Development Agreement-Hialeah Racetrack

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In 2010, the South Florida Racing Association, LLC applied for and received a Slot Machine License from the Florida Department of Business Regulation, Division of Pari-Mutuel Wagering, pursuant to a change in state law that allowed the Hialeah Racetrack to be eligible for casino gambling in conjunction with thoroughbred horse racing.

Accordingly, the owner and operator of Hialeah Racetrack desire to open the casino and conduct thoroughbred horse racing this summer. The Development Agreement provides for casino gambling (operation of slot machines) for 30 years at the Hialeah Racetrack within the parameters of state law. For this privilege, the Hialeah Racetrack shall pay an annual contribution to the City from gross slot revenues as follows: (1) 1.5% contribution from revenues up to and including \$200 million; (2) 1.65% contribution from revenues over \$200 million up to and including \$300 million; (3) 2.0% contribution from revenues over \$300 million up to and including \$550 million; and (4) 2.25% contribution from revenues over \$550 in any calendar year.

**ORDINANCE NO. 2013-39**

ORDINANCE APPROVING THE DEVELOPMENT AGREEMENT BY AND AMONG BAL BAY REALTY LTD, A FLORIDA LIMITED PARTNERSHIP, SOUTH FLORIDA RACING ASSOCIATION, LLC, A FLORIDA LIMITED LIABILITY COMPANY, AND THE CITY OF HIALEAH, FLORIDA, A COPY OF WHICH IS ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "1". **PROPERTY COMPRISING AN AREA HAVING EAST 32 STREET AS ITS NORTHERN BOUNDARY, HAVING EAST 4 AVENUE AS ITS EASTERN BOUNDARY, HAVING EAST 21 STREET AS ITS SOUTHERN BOUNDARY AND HAVING PALM AVENUE AS ITS WESTERN BOUNDARY; ALL LOCATED IN HIALEAH, FLORIDA.** REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HERewith; PROVIDING PENALTIES FOR VIOLATION HEREOF; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

**WHEREAS**, the Planning and Zoning Board at its meeting of May 22, 2013 recommended approval of this ordinance; and

**WHEREAS**, the City, Bal Bay Realty Ltd. and South Florida Racing Association LLC desire to enter into a development agreement pursuant to the Florida Local Development Agreement Act, sections 163-3220 et seq., Florida Statutes; and

**WHEREAS**, the Development Agreement confirms the expanded permitted uses within the Hialeah Park District, including, but not limited to, slot machine gambling.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, THAT:

**Section 1:** The foregoing facts and recitations contained in the preamble to this ordinance are hereby adopted and incorporated by reference as if fully set forth herein.

**Section 2:** The City of Hialeah, Florida hereby approves the Development Agreement by and among Bal Bay Realty Ltd., a Florida limited liability company, South Florida Racing

Association, LLC, a Florida limited liability company, and the City of Hialeah, Florida, a copy of which is attached hereto and made a part hereof as Exhibit "1" and in furtherance thereof, the City of Hialeah authorizes the Mayor and the Acting City Clerk, as attesting witness, on behalf of the City, to enter into the Development Agreement and execute any document relating thereto. The Development Agreement covers property comprising an area having East 32 Street as its northern boundary, having East 4 Avenue as its eastern boundary, having East 21 Street as its southern boundary and having Palm Avenue as its western boundary; all located in Hialeah, Florida.

**Section 3: Repeal of Ordinances in Conflict.**

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

**Section 4: Penalties.**

Every person violating any provision of the Code or any ordinance, rule or regulation adopted or issued in pursuance thereof shall be assessed a civil penalty not to exceed \$500.00 within the discretion of the court or administrative tribunal having jurisdiction. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. In addition to the penalty prescribed above, the city may pursue other remedies such as abatement of nuisance, injunctive relief, administrative adjudication and revocation of licenses or permits.

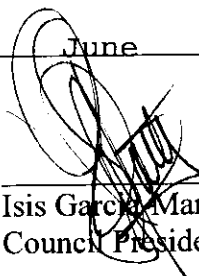
**Section 5: Severability Clause.**

If any phrase, clause, sentence, paragraph or section of this ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

**Section 6: Effective Date.**

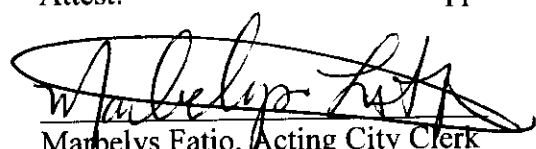
This ordinance shall become effective when passed by the City Council and signed by the Mayor or at the next regularly scheduled City Council meeting, if the Mayor's signature is withheld or if the City Council overrides the Mayor's veto.


PASSED and ADOPTED this 25 day of June, 2013.

  
\_\_\_\_\_  
Isis Garcia Martinez  
Council President

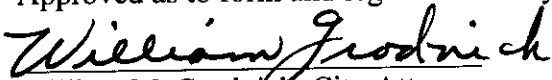
Attest:

Approved on this 16 day of July, 2013.

  
\_\_\_\_\_  
Marbelys Fatjo, Acting City Clerk

  
\_\_\_\_\_  
Mayor Carlos Hernandez

Approved as to form and legal sufficiency:

  
\_\_\_\_\_  
William M. Grodnick, City Attorney

# **DEVELOPMENT AGREEMENT**

**between**

**CITY OF HIALEAH,  
A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER  
THE LAWS OF THE STATE OF FLORIDA**

**BAL BAY REALTY LTD.  
A LIMITED PARTNERSHIP ORGANIZED  
UNDER THE LAWS OF THE STATE FLORIDA**

**and**

**SOUTH FLORIDA RACING ASSOCIATION, LLC  
A LIMITED LIABILITY COMPANY ORGANIZED  
UNDER THE LAWS OF THE STATE FLORIDA**

## *INTRODUCTION*

This is a Development Agreement (the "Agreement"), dated July 16, 2013 (the "Effective Date"), by and among (i) CITY OF HIALEAH, a Florida municipal corporation organized and existing under the laws of the State of Florida (the "City"), (ii) BAL BAY REALTY, LTD., a limited partnership organized under the laws of the State of Florida (the "Bal Bay"), the owner of real property located at 2200 East 4<sup>th</sup> Avenue, Hialeah, Florida (the "Facility"), which is legally described on attached Exhibit A, and (iii) SOUTH FLORIDA RACING ASSOCIATION, LLC, a limited liability company organized under the laws of the State of Florida ("South Florida Racing"), and the holder of the pari-mutuel permit to operate at the Facility issued by the Florida Department of Business and Professional Regulation pursuant to Chapter 550, Florida Statutes (collectively, Bal Bay and South Florida Racing, the "Developers," as further defined herein).

WHEREAS, in November 2004, the voters of the State of Florida approved an amendment to the Florida Constitution that gave the governing body of Broward County and Miami-Dade County the authority to hold a county-wide referendum on whether to authorize Slot Machines to be placed within existing, licensed pari-mutuel facilities located in the County, codified as Article X, Section 23 of the Florida Constitution;

WHEREAS, after approval of the amendment to the Florida Constitution, the Florida Legislature adopted Chapter 551, Fla. Stat., setting forth a comprehensive regulatory framework for the operation of Slot Machines at pari-mutuel facilities;

WHEREAS, in 2009, the Florida Legislature amended Chapter 551, Fla. Stat., to expand the definition of "eligible facility" set forth in Section 551.102(4), Fla. Stat., to include the following: "any licensed pari-mutuel facility located within a count as defined in s. 124.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately

preceding its application for a Slot Machine license, pays the required license fee, and meets the other requirements of this chapter;"

WHEREAS, in 2010, pursuant to the amended definition of "eligible facility" under Section 551.102(4), Fla. Stat., South Florida Racing applied for and received a Slot Machine license from the Florida Department of Business and Professional Regulations, Division of Pari-Mutuel Wagering (the "Department");

WHEREAS, the holders of various pari-mutuel wagering permits in Miami-Dade County filed suit against South Florida Racing and the Department seeking a declaratory judgment that the amendment to Section 551.102(4), Fla. Stat., was unconstitutional because it conflicted with the Article X, Section 23 of the Florida Constitution;

WHEREAS, the Florida First District Court of Appeals upheld the granting of the motion for summary judgment filed by South Florida Racing, finding that the Florida Legislature retained the broad discretion to regulate and control pari-mutuel wagering and gambling under its police powers, including expanding the class of facilities permitted to offer Slot Machine gambling;

WHEREAS, after the conclusion of the litigation challenging the Slot Machine permit, South Florida Racing desires to expand the Facility and commence Slot Machine operations at the Facility;

WHEREAS, City and the Developers recognize that the addition of Slot Machines to the existing uses at the Facility impacts the health and general welfare of the residents of City;

WHEREAS, City and the Developers recognize that the residents of the City have legitimate concerns over its increased development, traffic, crime, congestion, and the quality of life in the City that will result from the further development and the expansion of gaming at the Facility;

WHEREAS, Developers are willing to enter into this Agreement in recognition that the Facility's long-term business interests are best served by accommodating the legitimate needs and concerns of the residents of the City;

WHEREAS, the Facility is currently zoned as C-2 Liberal Retail Commercial under the City's Land Development Regulations, subject to an overlay district referred to as the "Hialeah Park District" (Section 98-1630.10, *et seq.*, City of Hialeah Code of Ordinances), and designated "Shopping Centers, Commercial, Stadiums, Tracks" in the Future Land Use Map of the Comprehensive Plan, and Developers and the City mutually desire that the Facility ultimately develop as permitted in the City's comprehensive plan and zoning code;

WHEREAS, this Agreement represents a good faith effort by City and the Developers to achieve a positive and constructive resolution to the significant issues that could negatively impact the relationship between the parties resulting from the expansion of the Facility and its gaming operations as contemplated by the plans set forth in Exhibit B (the "Project");

WHEREAS, this Agreement reflects an enhancement of the relationship between the parties and a continuing desire by City and Developers to take a proactive approach to issues arising from the Facility's operations for the benefit of the residents of the City; and

NOW THEREFORE, for good and valuable consideration given and received by each party as consideration for entering into this Agreement, the adequacy and sufficiency of which the parties hereby acknowledge, and further in consideration of the mutual terms, conditions, promises, covenants, and payments hereinafter set forth, City and Developers agree as follows:

## ARTICLE 1

### DEFINITIONS AND IDENTIFICATIONS

In addition to the terms defined in the clauses above or in the body of this Agreement, the following definitions shall apply herein.

- 1.1 **Applicable Law** - The phrase "Applicable Law" means those applicable federal, state, or local laws, rules, regulations, codes, ordinances, resolutions, administrative orders, schedules, permits, decrees, tariffs, policies, procedures and orders that govern or relate to the respective parties' activities, including such parties' obligations and performance under this Agreement, all as they may be amended from time-to-time.
- 1.2 **Comprehensive Plan** - The phrase "Comprehensive Plan" means the plan adopted by the City pursuant to Chapter 163, Florida Statutes ("F.S."), meeting the requirements of Section 163.3177, F.S., Section 163.3178, and Section 163.3221(a), F.S., which is in effect as of the Effective Date.
- 1.3 **Developers** - The term "Developers" means the person or entities that (i) own the real property located at 2200 East 4<sup>th</sup> Avenue, Hialeah, Florida, at which Slot Machines may be authorized pursuant to Chapter 551, Fla. Stat., (ii) the operator of the Facility at which such Slot Machines may be authorized, (iii) the holder of the pari-mutuel permit issued by the Department pursuant to Chapter 550, Fla. Stat., or (iv) any heirs, successors and assigns of any such person or entity. For avoidance of doubt, as of the execution date of this Agreement, the term Developers includes both Bal Bay, as the owner of the Facility, and South Florida Racing, as the operator of the Facility and the holder of the pari-mutuel permit.
- 1.4 **Effective Date** - The phrase "Effective Date" means the latter of the dates of recordation of this instrument or thirty days after this instrument has been received by the state land planning agency pursuant to Section 163.3239, Fla. Stat.
- 1.5 **Gross Slot Revenues** - The phrase "Gross Slot Revenues" means the total of all cash and property, except nonredeemable credits, received by the Slot Machines at the Facility less the amount of cash, cash equivalents, credits, and prizes paid to winners of slot machine gaming (except such credits will not include travel expenses, food, refreshments, lodging or services offered to patrons of the Facility).
- 1.6 **Land Development Regulations** - The phrase "Land Development Regulations" means ordinances, rules and policies enacted or customarily implemented by the City for the

regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulation or any other regulations controlling the development of or construction upon land in effect as of the Effective Date.

- 1.7 **Slot Machine** - The phrase "Slot Machine" means (i) any machine as defined by Section 849.16, Fla. Stat., or any machine derivative thereof that operates as a slot machine under any Applicable Law.

## ARTICLE 2

### INTENT

It is the intent of the parties that this Agreement should be construed and implemented so as to effectuate the purposes and intent of the parties and the purpose and intent of the Florida Local Government Development Agreement Act, Section 163.3220, F.S., *et. al.*

## ARTICLE 3

### TERM

This Agreement shall be for a term of thirty (30) years, beginning on the Effective Date, unless extended by mutual consent of the governing body of the City of Hialeah, subject to a public hearing in accordance with Section 163.3225, Florida Statutes, and the Developers.

## ARTICLE 4

### PERMITTED DEVELOPMENT USES; OTHER DEVELOPMENT AGREEMENT REQUIREMENTS

- 4.1 *Permitted Development Uses.* Prior to the adoption and acceptance of this Agreement, the City designated the Facility as C-2 Liberal Retail Commercial pursuant to the Land Development Regulations, and subject to an overlay district referred to as the "Hialeah Park District," Section 98-1630.10, *et seq.*, City of Hialeah Code of Ordinances (the "Existing Zoning"). In granting the Existing Zoning, the City determined that development and uses within the Facility are consistent with the Comprehensive Plan and its designation as "Shopping Centers, Commercial, Stadiums, Tracks" under the Future Land Use Map of the Comprehensive Plan (the "Existing Designation"). Upon execution of this Agreement and for the duration thereof, the City confirms and agrees that the population densities, building intensities and height of the development within the Facility will be as permitted by the Existing Zoning (as in effect as of the Effective Date), or such laws and policies subsequently adopted and applied to the Facility solely pursuant to the procedures of Section 163.3233(2), Florida Statutes.
- 4.2 *Public Services and Facilities; Concurrency.* The City confirms that the Facility is currently served by all necessary public facilities required for the use and the development of the Project. For the purposes of concurrency review, the City hereby agrees that, throughout the duration of this Agreement, sufficient capacity for such public facilities as regulated by concurrency standards under the Comprehensive Plan will be



reserved and remain available to serve the development of the Project. All subsequent development orders or permits for the Project sought to be issued, which are in conformity with this Agreement, Existing Zoning, and the Existing Designation, are hereby found to meet concurrency standards set forth in the Comprehensive Plan, as such standards may be amended from time to time, and to be consistent with Land Development Regulations, so long as the Developers develop the Facility in general compliance with the description of the Project and the terms and conditions contained within the Existing Zoning, Existing Designation, and this Agreement.

- 4.3 *Reservation or Dedication of Land.* Except as otherwise provided in this Agreement or pursuant to applicable subdivision regulations, the Developer will not be required to dedicate or reserve any land within the Facility for municipal purposes as a condition to this Agreement.
- 4.4 *Local Development Permits.* The Developer contemplates the development of the Project in accordance with the Existing Zoning. Notwithstanding the foregoing, the City may need to approve certain additional development permits in order for the Developer to complete the Project in a manner consistent with the Land Development Regulations in effect as of the Effective Date and Comprehensive Plan designations affecting the Facility, such as:
- (i) Site plan approvals;
  - (ii) Land improvement permits
  - (iii) Subdivision plat and or waiver of plat approvals;
  - (iv) Water, sewer, paving and drainage permits;
  - (v) Covenant or unity of title acceptance or the release of existing unities or covenants;
  - (vi) Building permits;
  - (vii) Certificates of use and/or occupancy; and
  - (viii) Any other official action of the City and/or Miami-Dade County, Florida, having the effect of permitting the development of land.
- 4.5 *Consistency with Comprehensive Plan.* The City hereby finds that, as of the Effective Date, the development within the Facility and the contemplated Project is consistent with the City's Land Development Regulations and the Existing Designation and shall not be subject to any future changes to the City's Land Development Regulations and Comprehensive Plan designation after the Effective Date and during the term of this Agreement; provided, however, the City may apply subsequently adopted laws and policies to the Facility solely pursuant to the procedures of Section 163.3233(2), Florida Statutes. The expiration or termination of this Agreement, for whatever reason, shall not be considered a waiver of, or limitation upon, the rights of the Developer as related to the Facility, including, but not limited to, any claims of vested rights or equitable estoppel to continue development of the Facility in conformity with the development approvals, permits or orders granted by the City.
- 4.6 *Necessity of Complying with Local Regulations Relative to Development Permits.* The Developer and the City agree that the failure of this Agreement to address a particular permit, condition, fee, term or restriction in effect on the Effective Date of this Agreement shall not relieve Developer of the necessity of complying with the regulation

governing said permitting requirements, conditions, fees, terms or restrictions as long as compliance with said regulation and requirements do not require the Developer to develop the Facility in a manner that is inconsistent with the Development Approvals.

- 4.7 *Further Development Review.* The Existing Zoning, the Land Development Regulations, the Comprehensive Plan, and this Agreement shall govern the development of the Facility for the term of this Agreement. As such, for the duration of this Agreement, the City shall not downzone or otherwise limit the ability of the Developer to develop the Facility in accordance with the Existing Zoning and nothing shall prohibit the issuance of further development orders and approvals in conformity with same. However, the City may apply subsequently adopted laws and policies to the Facility, solely pursuant to the procedures of Section 163.3233(2), Florida Statutes and nothing herein shall prohibit an increase in developmental density or intensity within the Facility in a manner consistent with the City's Comprehensive Plan and Land Development Regulations, or any change requested or initiated by the Developer in accordance with applicable provisions of law.

## ARTICLE 5

### CONTRIBUTIONS

- 5.1 Until such time that Developers commence to operate Slot Machines, the Developers shall have no obligation to pay the Gross Slot Revenues. Upon commencement of operations through the end of the Term, the Developers agree to pay the City a monthly amount in arrears equal to 1.5% of the applicable month's Gross Slot Revenues (the "Monthly Percentage Payment"). The Monthly Percentage Payment shall become due and payable by the Developers on the 15<sup>th</sup> day of the calendar month following its accrual.
- 5.2 In addition to the Monthly Percentage Payment and through the Term, the Developers shall pay to the City an additional annual percentage of Gross Slot Revenues equal to the following: 1.5% up to and including Two Hundred Million Dollars (\$200,000,000.00) of Gross Slot Revenues recognized in the calendar year plus 1.65% of the Gross Slot Revenues recognized in the calendar year above Two Hundred Million Dollars (\$200,000,000.00) up to and including Three Hundred Million Dollars (\$300,000,000) plus 2.0% of the Gross Slot Revenues recognized in the calendar year above Three Hundred Million Dollars (\$300,000,000.00) up to and including Five Hundred Fifty Million Dollars (\$550,000,000) plus 2.25% of the Gross Slot Revenues recognized in the calendar year over Five Hundred Fifty Million Dollars (\$550,000,000) less all amounts paid during such calendar year as Monthly Percentage Payments (the "Additional Annual Percentage Payment"). The Additional Annual Percentage Payment shall become due and payable by the Developers by no later than March 1<sup>st</sup> of the year following its accrual.
- 5.3 The Developers shall accompany the Monthly Percentage Payment and the Additional Annual Percentage Payment with a completed form that reconciles wagers received from Slot Machines to Gross Slot Revenues and any other payments required under this Agreement including any interest due or other adjustments of said revenues, certified by the chief financial officer (or the equivalent) of the Developers. The referenced form will be promulgated by the City. The Additional Annual Percentage Payment will also

be accompanied by the Developers' audited financial statements for the fiscal year most proximate to the date of payment of the Additional Annual Percentage Payment and copies of the corresponding pari-mutuel revenue reports generated by the Department.

- 5.4 If the Developers fail to pay the Monthly Percentage Payment or Additional Annual Percentage Payment when due, the City will have the right to impose an administrative fee of ten percent (10%) of the unpaid delinquent balance. In addition to the administrative fee, interest on the delinquent amount shall accrue at the rate of one percent (1%) per month until the amount of the delinquent balance is paid in total.
- 5.5 If the Florida Legislature passes any act of law establishing an affirmative obligation on the part of the City to regulate Slot Machine operations, Developers agree to reimburse the City for any costs to the City attributable to such law.
- 5.6 All payments required under this Agreement shall be made by wire transfer pursuant to written instructions provided by the City.
- 5.7 Developers agree that each will not seek the approval of the Department or any other state agency permitted to authorize the relocation of slot machine operations, for authorization to move in whole or in part the physical location of the operation of slot machines to a location other than the Facility with the prior written consent of the City.

## ARTICLE 6

### GOVERNMENTAL IMMUNITY

Nothing herein is intended to serve as a waiver of sovereign immunity by City nor shall anything included herein be construed as consent to be sued by third parties in any matter arising out of this Agreement.

## ARTICLE 7

### INDEMNIFICATION

- 7.1 Developers shall, at all times hereafter, indemnify, hold harmless and, at City's option, defend or pay for an attorney selected by City to defend City, its elected officials, officers, employees, agents, servants, and employees against any and all claims, losses, liabilities, and expenditures of any kind, including attorney fees, court costs, expenses, and judgments through and including all appellate or administrative proceedings, or both, arising out of or in connection with (i) any conduct of, or negligent act or omission of the Developers, their employees, agents, servants, or officers, accruing, (ii) the operations at the Facility, including, without limitation, any and all claims, demands, or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property, or (iii) any matters related to this Agreement, including as to its validity and enforceability, brought by any third person.
- 7.2 Article 7 shall survive termination or expiration of this Agreement and, thereafter, shall continue until the end of any and all applicable statutes of limitation for any and all court

actions and administrative proceedings that may be filed against City, its elected officials, officers, agents, servants, and employees.

- 7.3 Notwithstanding the foregoing and subject to City's rights set forth in this Section 7.3, Developers shall have the sole and exclusive authority to defend City, its elected official, officers, agents, servants, and employees in any proceeding covered by this Article 7 and to direct the defense of any such proceeding when the relief sought in such proceeding has the potential to "Adversely Impact Slot Machine Operations." For the purposes of this Article 7, a proceeding shall be considered to have the potential to "Adversely Impact Slot Machine Operations" at the Facility, if the relief sought in such proceeding would reasonably result in a material reduction in the amount of Gross Slot Revenues generated by the Developers at the Facility. If City and Developers are each named as parties in any litigation that could Adversely Impact Slot Machine Operations or if City deems it to be in its best interest, City may at its sole option, elect to hire a separate, independent attorney at City's expense to represent City's interests in such litigation. City shall be fully and timely appraised and kept informed as the litigation progresses by the Developers of any litigation in which City is a named party and shall have the right to monitor such litigation, as some litigation may have financial or political ramifications of concern to City.

## ARTICLE 8

### BANKRUPTCY PROVISIONS

- 8.1 To the fullest extent provided or allowed by law, in the event Developers file for protection under any federal or state bankruptcy, insolvency, receivership or other creditor protection statute, or otherwise has filed against it a similar involuntary proceeding that is not dismissed within thirty (30) days (a "Bankruptcy Occurrence"), then the Developers agree that this Agreement shall not be deemed an executory contract given that City has fully performed its obligations hereunder and all that remains is fulfillment of the Developers' payment of the moneys due hereunder to City. In all respects, the Developers agree that each will not assert that this is an executory contract, and hereby waives all claims, arguments and/or contentions to the contrary.
- 8.2 Notwithstanding the provisions of Section 8.1, in the event it is determined that this is an executory contract or that the waiver set forth above is unenforceable for any reason, then the Developers agree not to seek to reject this Agreement pursuant to Section 365(a) of the Bankruptcy Code, or any similar state law provision, if any, as an executory contract, or to assist, support or join any motion made by a third party seeking to force a rejection of this Agreement as an executory contract or for any other reason. If a Bankruptcy Occurrence occurs, then Developers agree to use their best efforts to obtain as soon as practicable an order of the court approving the assumption of this Agreement, under Section 365 of the Bankruptcy Code, or any applicable state law, and if a motion is made seeking the rejection of this Agreement, to oppose such motion and instead seek the assumption hereof.

## ARTICLE 9

### PERMITS

The Developers shall pay all licensing, permit, processing, review and impact fees as may be required pursuant to Applicable Laws as such fees become due and payable for the operation or expansion of the Facility. City does not offer, promise or otherwise grant to the Developers or Facility by this Agreement any right, prior approval or action in contradiction to any existing Applicable Law. City's sole and only commitment by this Agreement is the timely processing and consideration of such requests and submittals made by the Developers. In this regard, City will use its best efforts to expedite such reviews and processing of the Developers' applications, whenever possible. In addition, the City will establish a process by which the Developer may apply for special event permits, where applicable, through a master permit process.

## ARTICLE 10

### MISCELLANEOUS

#### 10.1 AUDIT RIGHT AND RETENTION OF RECORDS

City shall have the right to audit the books, records, and accounts of the Developers directly related to the calculation of Gross Slot Revenues, upon reasonable notice, in order to ascertain the correctness of the Gross Slot Revenues payment required to be made to City pursuant to this Agreement, including the accurate reporting of Gross Slot Revenues and the determination of the Monthly Percentage Payment and the Additional Annual Percentage Payment. Developers shall keep such books, records, and accounts as may be necessary in order to record complete and correct entries related to the calculation of Gross Slot Revenues. All books, records, and accounts of the Developers relating to Gross Slot Revenues shall be kept in written form, or in a form capable of conversion into written form within a reasonable time, and upon reasonable request to do so, Developers shall make same available at no cost to City in written form.

Developers shall preserve and make available, at reasonable times for examination and audit by City, all financial records, supporting documents, statistical records, and any other documents pertinent to the calculation of Gross Slot Revenues, Monthly Percentage Payment, and the Additional Annual Percentage Payment for a period of seven (7) years after the creation of the record. If any audit has been initiated and audit findings have not been resolved at the end of the specified retention period, the books, records, and accounts shall be retained until resolution of the audit findings. If the Florida Public Records Act is determined to be applicable to the Developers' records relating to Gross Slot Revenues, Developers shall comply with all requirements thereof.

Any incomplete or incorrect entry or entries in excess of Two Hundred Thousand Dollars (\$200,000.00) of cumulative, annual funds that should be used to calculate Gross Slot Revenues in a particular fiscal year in such books, records, and accounts shall be a basis for City to apply an administrative fee (to defray the cost of the audit) of ten percent (10%) of any delinquent amount owed to City plus interest in an amount of one percent (1%) per month calculated from the date the payment should have been made until the delinquent amount owed has been paid. Any underpayment shall be paid by Developers to City within ten (10) days of notice of the audit finding, including interest and the administrative fee if owed.

## 10.2 INDEPENDENT CONTRACTOR

Nothing contained in this Agreement shall be construed as establishing an agency relationship between the City and the Developers and neither the Developers nor their employees, agents, contractors, subsidiaries, divisions, affiliates or guests shall be deemed agents, instrumentalities, employees, or contractors of the City for any purpose hereunder. The City, its contractors, agents and employees shall not be deemed contractors, agents or employees of the Developers or their subsidiaries, divisions or affiliates.

## 10.3 THIRD PARTY BENEFICIARIES

Developers and City agree that there are no intended third party beneficiaries to this Agreement and that no third party shall be entitled to assert a right or claim against any party based upon this Agreement.

## 10.4 NOTICES

Whenever the parties desire to give notice to the other, such notice must be in writing, sent by certified United States Mail, postage prepaid, return receipt requested, or by hand delivery with a request for a written receipt of acknowledgment of delivery, addressed to the party for whom it is intended at the place last specified. The place for giving notice shall remain the same as set forth herein until changed in writing in the manner provided in this section. For the present, the parties designate the following:

To the City:

City of Hialeah  
501 Palm Avenue  
Hialeah, Florida 3301  
Attn: Mayor  
Tel: 305-883-5800

With a copy to:

City of Hialeah  
501 Palm Avenue  
Hialeah, Florida 3301  
Attn: Finance Director  
Tel: 305-883-5856

City of Hialeah  
501 Palm Avenue  
Hialeah, Florida 3301  
Attn: City Attorney  
Tel: 305-883-5853

To the Developers:

Bal Bay Realty, Ltd.  
South Florida Racing Association, LLC  
2200 East 4<sup>th</sup> Avenue  
Hialeah, Florida 33013  
Attn: John J. Brunetti, Sr.  
Tel: 305-

With copy to:

Bilzin Sumberg  
1450 Brickell Avenue  
23<sup>rd</sup> Floor  
Miami, Florida 33131  
Tel: 305-250-2374

Any party to this Agreement may change its notification address(es) by providing written notification to the remaining parties pursuant to the terms and conditions of this section.

#### 10.5 SUCCESSION AND ASSIGNMENT

The obligations imposed pursuant to this Agreement upon the Developer and upon the Facility shall run with and bind the Facility as covenants running with the Facility, and this Agreement shall be binding upon and enforceable by and against the parties hereto, their personal representatives, heirs, successors, grantees and assigns, and a copy of this Agreement shall be recorded in the Public Records of Miami-Dade County, Florida, at the sole cost and expense of the Developer upon execution of this Agreement.

#### 10.6 WAIVER OF BREACH

Neither City's nor Developers' failure to enforce any provision of this Agreement shall be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.

#### 10.7 COMPLIANCE WITH LAWS

City and Developers, respectively, shall comply with all Applicable Law in performing their duties, responsibilities, and obligations pursuant to this Agreement, including but not limited to the City's zoning regulations, comprehensive plan and subdivision regulations. No subsequently enacted law, code, ordinance, rule or regulation by the City or any other governmental body shall be construed to limit or restrict the payment required to be made to City by Developers under this Agreement. In addition, Developers acknowledge that this Agreement does not reduce or mitigate Developers' obligation to pay City all applicable taxes or fees required by Applicable Law.

#### 10.8 SEVERANCE

In the event any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions of this Agreement shall continue to be effective. In such event, the parties shall first negotiate to amend this Agreement to address any portion found to be invalid or unenforceable. If the parties fail to negotiate an amendment, City shall be entitled to present to Developers an alternative provision that Developers shall agree to accept; provided, however, that such provision gives City no greater rights and gives Developers no greater obligations than the provision invalidated or determined to be unenforceable. Notwithstanding Developers' continuing obligation to agree to an alternative provision as provided above, this Agreement shall be subject to reformation or other equitable remedy by a court of

competent jurisdiction inasmuch as the parties expressly intend that the invalidity or unenforceability of any portion of this Agreement shall not result in the invalidity or unenforceability of the purpose and intent of the parties in entering into this Agreement.

Notwithstanding the foregoing, if a court of competent jurisdiction were to determine that this Agreement must terminate or invalidate the entire Agreement, City shall be entitled to present to Developers an alternative form of agreement that Developers shall agree to accept; provided, however, that such agreement gives City no greater rights and gives Developers no greater obligations than this Agreement. The provisions of this section shall survive if this Agreement terminates for any reason. Unless and until any court of competent jurisdiction expressly determines in an action in which both City and Developers are named party defendants that it is illegal for Developers to do so, Developers shall pay City the amounts required by Article 5 and shall continue to make such payments until a new agreement is entered into by the parties.

#### 10.9 JOINT PREPARATION

The parties acknowledge that they have sought and received whatever competent advice and counsel necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this Agreement has been their joint effort. The language agreed to expresses their mutual intent and the resulting document shall not be construed more strictly against one of the parties than the other.

#### 10.10 JURISDICTION, VENUE; WAIVER OF JURY TRIAL

This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida, without regard to conflict of laws principles. All parties agree and accept that jurisdiction of any controversies or claims arising out of this Agreement, and any action involving the enforcement or interpretation of any rights hereunder, shall be in the state courts located in Miami-Dade County, Florida, and venue for litigation arising out of this Agreement shall be in the state court located in Miami-Dade County, Florida, forsaking any other jurisdiction that either party may claim by virtue of its residency or other jurisdictional device. By entering into this Agreement, Developers and City hereby expressly waive any rights either party may have to a trial by jury of any civil litigation related to this Agreement.

#### 10.11 AMENDMENTS

No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by Developers and by City following approval by the City Council.

#### 10.12 PRIOR AGREEMENTS

This document represents the final and complete understanding of the parties and incorporates or supersedes all prior negotiations, correspondence, conversations, agreements, and understandings applicable to the matters contained herein. The parties agree that there is no commitment, agreement, or understanding concerning the subject



matter of this Agreement that is not contained in this written document. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representation or agreement, whether oral or written.

10.13 REPRESENTATION OF AUTHORITY; LICENSE REQUIREMENT AND PARI-MUTUEL REPRESENTATIONS

Each individual executing this Agreement on behalf of a party hereto hereby represents and warrants that he or she is, on the date he or she signs this Agreement, duly authorized by all necessary and appropriate action to execute this Agreement on behalf of such party. South Florida Racing represents that it is a licensed pari-mutuel operator under Chapter 550, Florida Statutes. During the Term, South Florida Racing further agrees to take all reasonable action necessary to retain its pari-mutuel license and retain a license authorizing the operation of Slot Machines.

South Florida Racing represents that it is the entity authorized to operate Slot Machines at the Facility. South Florida Racing shall not, directly or indirectly, agree to assign or transfer (including by operation of law) any of its rights to the Gross Slot Revenues or create a new entity that would in any way divert Slot Machine revenues from the Facility.

10.14 NON-EXCLUSIVITY

Nothing in this Agreement is intended to create any exclusive rights in the Developers to conduct Slot Machine operations within the City. In the event that other persons are authorized to conduct Slot Machine operations within the City, then the City may permit, authorize and regulate such business and may enter into contracts to the same, similar or different effect as contemplated by this Agreement without incurring any liability, contractual or otherwise, to the Developers.

10.15 ACKNOWLEDGEMENT OF APPLICATION OF CHAPTER 550, FLA. STAT.

Nothing in this Agreement is intended to (i) limit or abridge any of the Developers' rights or privileges under Chapter 550, Fla. Stat., or (ii) permit the City to require any permits, approvals or licenses in connection with pari-mutuel wagering at the Facility in contravention of Chapter 550, Fla. Stat., including, without limit, Section 550.155, Fla. Stat.

10.16 MULTIPLE ORIGINALS

Multiple copies of this Agreement may be executed by all parties, each of which, bearing original signatures, shall have the force and effect of an original document.

10.17 REMEDIES; NON-EXCLUSIVE REMEDIES

In addition to all other remedies provided in this Agreement or under applicable law, City shall also be entitled to specifically enforce this Agreement, including the payment obligations of Developers provided herein. Developers acknowledge and agrees that the provisions of this Agreement are unique, and the damages City might suffer upon a breach hereof are incapable of precise calculation. Accordingly, the Developers hereby waive any and all objections, whether provided under federal or state law, including any

bankruptcy or insolvency provisions, that the Developers might have to any claim for specific performance that City might assert.

No remedy or election given by any provision of this Agreement shall be deemed exclusive. Wherever possible, the remedies granted hereunder upon a default of the other party shall be cumulative and in addition to all other remedies at law or equity arising from such event of default.

Bay Bal and South Florida Racing hereby agree that the payment obligations under this Agreement are the joint and several obligation of Bay Bal and South Florida Racing.

The Developers hereby acknowledge that the failure of the Developers to make payments when due and owing to the City will result in the denial of the renewal of the Developers' local business tax receipt to operate at the Facility as set forth in Section 86-53, City of Hialeah Code of Ordinances. Because the obligations hereunder run with the land, if the Developers assign or transfer the Slot Machine operations to any entity with such entity purporting not to assume the obligation's hereunder (including any transfer thereof by operation of law), the Developers hereby acknowledge that the City will have the authority to deny such new entity a local business tax receipt until such time as the new entity expressly assumes the obligations hereunder and makes payment of all amounts due and owing to the City.

#### 10.18 COVENANT NOT TO SUE

City and Developers hereby covenant that they shall not commence or maintain any lawsuit, administrative proceeding, or other action, whether at law or in equity, which challenges the validity or enforceability of this Agreement. This covenant shall be binding upon, and inure to, the benefit of the parties, their successors, assigns, heirs, legal representatives, and personal representatives.

#### 10.19 WAIVER OF DEFENSES

Developers and City hereby waive any and all claims for lack, inadequacy or insufficiency of consideration, lack of mutuality of remedy or obligation, definiteness in time or other uncertainty, or any other defense or claim to the formation and creation of an enforceable contract. In all respects, the parties agree that this Agreement shall be enforceable as written and, unless otherwise mutually agreed to by the parties, waive any and all objections or arguments to the contrary. Developers hereby waive any and all claims that this Agreement, as a covenant running with the land, is invalid or unenforceable in any respect and Developers agree that this Agreement is enforceable as written and constitutes a property interest in the Facility and hereby waive any other claims to the contrary.

(THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK)

**IN WITNESS WHEREOF, the City and Developer have caused this Agreement to be duly executed on the date set forth above.**

**Developer:**

Bal Bay Realty, Ltd., a Florida limited partnership

By: Bal Bay Managers, Inc., its  
General Partner

By: JJ Brunetti  
John J. Brunetti, Sr.  
President

Date: 7/12/13

South Florida Racing Association, LLC, a  
Florida limited liability company

By: JJ Brunetti  
John J. Brunetti, Sr.  
Managing Member

Date: 7/12/13

**City:**

City of Hialeah, Florida

Attest: Marbelys Fatjo  
By: Marbelys Fatjo  
Marbelys Fatjo  
Acting City Clerk

By: Carlos Hernandez  
Carlos Hernandez  
Mayor

Date: 7/16/13

Approved as to form and legal sufficiency:

William Grodnick  
William Grodnick  
City Attorney